IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No. 446 of 1992

Peter Anthony Lopes (since deceased) .. Org.Petitioner
1. Mrs. Maria Augustia Wd/o Peter Lopes
   Occupation Household.
2. Anthony S/o Peter Lopes,
   Occupation Service, Both Petitioners
   are heirs and legal representative of
   the deceased Petitioner, Peter Anthony
   Lopes, Adults, Indian Inhabitants of
   Bombay, residing at Room No. 206,
   2nd Floor, Panchsheel Mazgaon,
   Mumbai 400 010 .. Petitioners

V/s.
1. Maharashtra Housing & Area
   Development Authority.

2. The Bombay Housing Area and
   Development Board,
   Housing Development Bhavan,
   Bandra (East), Bombay 400 051 .. Respondents

Mr. Z.T. Andhyarujina i/b. Mr. M.H. Munshi for the Petitioners.
Ms. Geeta Shastri, AGP. for the Respondents.

CORAM : S. RADHAKRISHNAN &
S.A. BOBDE, JJ.
DATED : 19.08.2004.

ORAL JUDGMENT (PER - S. RADHAKRISHNAN, J.):-

1. The facts are that the original Petitioner Peter A. Lopes was a tenant of room no. 10 as well as room no. 11 with regard to Mohammedali Manzil building, presently known as Laxmi Nivas building. The aforesaid building was owned by a private landlord. The building became dilapidated and accordingly building was demolished in the year 1983, for the purpose of reconstruction. After the said building was demolished, it appears that the said Peter had addressed letters to Respondent Housing Board on

20.9.1985, wherein it is clearly mentioned that Peter

has been staying in room no. 10 and 11, alongwith his family consisting of wife, college going daughter, married son, daughter-in-law and two school going children. The said letter clearly indicates that Mr. Peter Lopes was a tenant of both room nos. 10 and 11 and his son Anthony also was living with his father Peter, as a member of the family.

2. It appears that after the said building was demolished and reconstructed, Peter was allotted a tenement in the new building. It appears that room no. 10 and 11 admeasured approximately 10 sq. mt. each and totalling to 20.03 sq. mtr. After the said demolition, the building was reconstructed by Maharashtra State Housing Board and Peter was allotted a tenement admeasuring 225 sq. ft. i.e. 20.90 sq. mtrs., which is slightly more than what was originally in occupation viz. room nos. 10 and 11 put together. To put in other words, the Petitioner was given an area, which is slightly more than what he was originally occupying.

3. By this Petition, the Petitioner basically is claiming that as originally the Petitioner was occupying two rooms i.e. the room no. 10 and 11, the Housing Board ought to have allotted two separate

tenements admeasuring 225 sq. ft. each.

4. Shri Andhyarujina, the learned counsel for the Petitioner brought to our notice the provisions of Section 92 of the Maharashtra Housing and Area Development Act, 1976, (hereinafter referred to as the "said Act") which contemplates that it shall be the duty of the Board to see that all the occupiers in the building proposed to be demolished shall, as far as practicable, be provided in the reconstructed building accommodation with a floor area equivalent to their floor area in the old building. The said Section 92(2) reads as under :-

> 92(2) in preparing the plans and estimates of the building to be reconstructed, it shall be the duty of the Board to see that all the occupiers in the building proposed to be demolished shall, as far as practicable, be provided in the reconstructed building accommodation with a floor area equivalent to their floor area in the old building provided that, in the case of an occupier of a residential tenement the floor area of the accommodation in the reconstructed building, shall not be less than the 20.90 square meters and more than the 70 square meters.

Shri Andhyarujina also brought to our notice that Section 2 clause 25 which defines "occupier", which reads as under:-

> (25) "occupier" includes --
>
> (a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in

respect of which such rent is paid or is payable;

(b) an owner in occupation of, or otherwise using, his land or building;

(c) a rent-free tenant of any land or building;

(d) a licensee in occupation of any land or building; and

(e) any person who is liable to pay to the owner damages for the use and occupation of any land or building;

and he contended that Anthony, Petitioner's son was occupier of room no. 11, and as such he was entitled to a separate tenement of 225 sq. ft. in addition to what was provided to Peter, admeasuring 225 sq.ft. Shri Andhyarujina contended that the said Anthony would fall under the definition of occupier under section 2(25)(d), in the sense that he was a licensee in occupation of said room no. 11. In the alternative, he contended that Anthony would fall under section 25(e) when a person who is liable to pay to the owner damages for the use and occupation of any land or building.

5. Shri Andhyarujina fairly conceded that the said Anthony never paid any license fees to his father Peter and that there was no leave and license agreement between the Petitioner and Anthony. Shri Andhyarujina in that behalf referred to two judgments of this Court in support of his contention, that Anthony is entitled to a separate tenement. The first judgment is that of

a learned Single Judge in **Smt. Sharmila R. Kotian Vs. State of Maharashtra and others AIR 1992 Bombay 53,** wherein it is clearly mentioned that the Respondent No. 3 in the said case, was in occupation of a room under a

leave and license agreement entered upon with the Petitioner's husband and it appears that the said building caught fire during the subsistence of the said leave and licence agreement. This judgment would not be of any help to the Petitioner, inasmuch as in the said judgment, there was a clear case of leave and license agreement with the third party and during the subsistence of the said agreement, the building caught fire and in view thereof, the learned Single Judge has held that the occupant of the building who was physically occupying the building as a licensee, was entitled to be protected under Section 2 (25) (d) of the Maharashtra Housing and Area Development Act, 1976. The learned Judge also clearly observed that in the record of tenants names, the name of the third Respondent was clearly entered and over and above, the Notice addressed by the Board was also addressed to the third Respondent but was served on the Petitioner's husband. In the said case, the learned Single Judge took a view that as there was subsisting leave and license agreement at the relevant time and as such the occupier has to be protected as per the Section 91(1), 94(5) read with Section 2(25). The second Judgment

sought to be relied by the learned counsel for the Petitioner is a Division Bench Judgment of this Court in **Taj Mohamed Yakub Vs. Abdul Gani Bhikan, 1991 Mh.L.J. 263,** which pertains to Maharashtra Slum Areas (Improvement, Clearance and Redevelopment Act, 1971).

The learned counsel had referred to this judgment in view of the fact that the definition of occupier under section 2(e) of the aforesaid Act is pari materia similar to section 2(25) of the Maharashtra Housing and Area Development Act, 1976. In the aforesaid case, before the Division Bench, it was a case of a trespasser. It was contended that the trespasser could not be evicted for the purpose of rebuilding the dilapidated building. In that context, the Division Bench, clearly took a view that the authority would be entitled to disposses the trespasser otherwise, the authority would be unable to carry out the execution of works for improvement of the slum area. In that context, the Division Bench was clearly of the view that the word occupier shall include even a trespasser otherwise, the very object of the Act would be defeated. In the instant case, Anthony was not a trespasser but was residing with his father Peter as a member of the family, hence the above judgment will not help the Petitioner.

6. The learned Assistant Government Pleader appearing

on behalf of the Board contended that only Peter was a tenant of room no. 10 as well as room no. 11 and as per the provisions of the aforesaid Act, only Peter being the occupier, was entitled to be provided with a tenement of not less than 225 sq.ft., which has already been provided. The learned Assistant Government

Pleader also pointed out that in fact the floor area of the both room nos. 10 and 11 put together is even less than 20.90 sq. mtr., whereas the Board has provided the tenement of 20.90 sq.mt. free of cost to the said Peter. The learned Assistant Government Pleader contended that Anthony, son of Peter could neither be a licensee nor a trespasser but was only a member of the family of Peter. The learned Assistant Government Pleader pointed out that Anthony was residing with his father as a member of the family. There is no dispute that the said Anthony did not pay any amount to the landlord and no rent receipt was issued to the said Anthony. Therefore, the contention of the learned Assistant Government Pleader is that, Anthony has no legal right whatsoever to claim a separate tenement under the said scheme. He brought to our notice a letter dated 20th September, 1985 addressed by Peter to the Board Exhibit L1 to the Petition, which indicates that Anthony was residing with his father as a member of the family.

7. After considering the contentions and submissions of both the sides, in the instant case, it is clear that Anthony was living with his father only as a member of his family and Anthony had no independent right in either of the rooms, to claim such an allotment of an additional tenement of 225 sq. ft. There is also no leave and license agreement and

Anthony was only residing as a member of the family. Under these circumstances, the submission of the learned counsel for the Petitioner that the said Anthony was as an occupier under Section 2(25)(d) or (e), can not be sustained, as the same has no basis. If that be so, the said Anthony can not claim any separate accommodation. The said Anthony is not an occupier at all within the definition of Section 2(25) of the said Act. In the aforesaid facts and circumstances, we find no merit in the above Petition. Hence Rule stands discharged, however with no order as to costs.

8. Parties to act on a true copy of this order duly authenticated by the Associate/Court Stenographer.

(S. RADHAKRISHNAN, J.)

(S.A. BOBDE, J.)